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 and all others similarly situated.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

JOHNNY MCFARLAND, on behalf of himself and all others similarly situated,)	CASE NO. CV 07-03953 PJH
)	
Plaintiff,)	MEMORANDUM OF POINTS AND
)	AUTHORITIES IN OPPOSITION TO
vs.)	DEFENDANT'S MOTION FOR PARTIAL
)	SUMMARY JUDGMENT
GUARDSMARK, LLC, and Does 1 through 50, inclusive,)	Date: 2/13/08
)	Time: 9:00 a.m.
)	Ctrm: 3, 17 th Floor
Defendants.)	Judge: Hon. Phyllis J. Hamilton

I. INTRODUCTION

Guardsmark's motion ignores one, deciding, fact. When an employee "agrees" to an on-duty meal period, the employee waives his or her right to an off-duty meal period. By entering into this "agreement," the employee also waives his or her right to the extra hour of compensation provided for in Labor Code section 226.7. While there is no dispute that an "on-duty" meal period is a "type" of meal period as Guardsmark asserts, it is also true that by agreeing to this "type" of

1 meal period, the employee waives two important pre-existing rights: the right to be off-duty for
2 the meal period and the right to compensation for not being relieved of all duty during the meal
3 period. Labor Code section 512 and section 11 of the applicable Wage Order make clear that an
4 employee can only waive their right to one off-duty meal period a day. Again, no linguistic
5 gymnastics can change this truism.

6 If section 512 clearly permits an employ to work more than ten (10) hour shifts without
7 ever being relieved of duty for meal periods as Guardsmark asserts, then one would assume that
8 the Legislature that enacted section 512 would be aware of this allowance. Being so aware, there
9 would be no need for the Legislature to propose an amendment to section 512 to allow that which
10 Guardsmark asserts section 512 already provides. But, this is not the case. To the contrary,
11 recognizing that no law permits what Guardsmark seeks, currently pending before the Legislature
12 is a proposed amendment that would amend section 512 to specifically provide that an employee
13 can agree to two on-duty meal periods in one day.

14 Assembly Bill No. 1711¹ seeks to amend Labor Code section 512. Under section (4), at
15 lines 36-38, the proposed amendment provides: "An employee who is eligible for an on-duty
16 meal may have a second on-duty meal period provided that he or she remains eligible for an on-
17 duty meal period." If what Guardsmark asserts is true, there would be no need for the proposed
18 amendment. The only conceivable reason for the proposed amendment is because neither section
19 512 nor the applicable Wage Order allows an employee to "agree" to waive their right to an off-
20 duty meal period twice in one day.

21 This fact is also evident from the clear wording of section 11(C) of the Wage Order. This
22 section, that is the only section mentioning the allowance for an "on-duty" meal period, always
23 refers to this allowance in the singular, stating that an employee may agree to "an" on-duty meal
24 period. This singular reference is consistent with the prohibition in section 512 against an
25 employee waiving his or her right to an off-duty meal period more than once a day. Guardsmark
26
27

28 ¹ Plaintiffs request that the Court take Judicial Notice of AB No. 1711. The Court can find this
Bill at www.leginfo.ca.gov under the Bill Information icon.

1 can point to no governing statute or order that speaks of an allowance for more than one on-duty
2 meal period in a given day. This is so because no such allowance exists.

3 I. LEGAL ARGUMENT

4 A. Plaintiff Agrees That California Rules of Statutory Construction Apply

5 Plaintiff agrees with Guardsmark's recitation of jurisprudential nuggets regarding
6 interpretation of statutes. Plaintiff also agrees with Guardsmark's recognition that California rules
7 of construction apply here. See In re First T.D. & Investment, Inc. Chang, 253 F.3d 520, 527 (9th
8 Cir. 2001). Unfortunately, Guardsmark fails to mention the most pertinent rule of statutory
9 construction: courts must interpret remedial statutes and wage orders liberally to give effect to
10 their remedial purpose. The California Supreme Court, some time ago, made this fundamental
11 rule of interpretation quite clear, stating:

12 in light of the remedial nature of the legislative enactments authorizing the regulation of
13 wages, hours and working conditions for the protection and benefit of employees, the
14 statutory provisions are to be liberally construed with an eye to promoting such protection.
15 As the court observed in California Grape etc. League, supra, 268 Cal. App. 2d 692, 698;
16 'Remedial statutes such as those under consideration [i.e., the statutes governing the
17 adoption of wage orders] are to be liberally construed. [Citation.] They are not construed
18 within narrow limits of the letter of the law, but rather are to be given liberal effect to
19 promote the general object sought to be accomplished . . . [para.]

20 Industrial Welfare Comm'n v. Superior Court, 27 Cal. 3d 690, 702-703 (1980). The California
21 Supreme Court affirmed this basic tenet of statutory construction in Ramirez v. Yosemite Water
22 Co., 20 Cal. 4th 785, 794 (1999)(*quoting Industrial Welfare Comm'n*).

23 In its moving papers, Guardsmark ignores the Valles v. Ivy Hill Corp., 410 F.3d 1071,
24 1077 (9th Cir. 2005), decision. This decision is dispositive on the issues before this Court. The
25 Valles court recognized the "object sought to be accomplished" by the remedial statutes at issue: a
26 work-free meal period. Explaining the importance of meal breaks, the Valles court stated "[m]eal
27 periods are designed to protect individual employees, [and] address some of 'the most basic
28 demands of an employee's health and welfare' [citation], and *Labor Code section 219, subdivision*

1 (a) makes them ‘plainly nonnegotiable.’” 410 F.3d at 1081-1082. The court iterated the goal of
 2 the Industrial Welfare Commission was to protect work free meal periods, stating:

3 For over half a century, the Industrial Welfare Commission ("IWC") -- the state agency
 4 responsible for promulgating regulations that govern wages, hours, and working conditions
 5 in California -- has guaranteed *work-free meal periods* to manufacturing workers in
 6 California, including those covered by collective bargaining agreements, pursuant to its
 7 authority under § 1173 of the Labor Code. See IWC Wage Order 1-2001, Cal. Code Regs.
 8 tit. 8 § 11010 (2005); California Manufacturers Assn. v. Industrial Welfare Com., 167 Cal.
 9 Rptr. 203, 215, 109 Cal. App. 3d 95 (1980); see also IWC v. Superior Court, 27 Cal. 3d
 10 690, 613 P.2d 579, 601, 166 Cal. Rptr. 331 (1980) (in bank). 410 F.3d at 1077. (Emphasis
 11 added).

12 The interpretation of section 512 and section 11 of the Wage Order offered by Guardsmark
 13 does just the opposite of what the California Supreme Court and the Ninth Circuit instruct. The
 14 clear intent of these statutes is to afford employees rest during their meal breaks, by assuring that
 15 they are work free. Rather than interpreting these statutes broadly to assure their remedial nature,
 16 Guardsmark’s construction eviscerates any protections afforded work-free meal periods to which
 17 employees are entitled as of right by statute. Guardsmark in effect argues that the clear statutory
 18 right to an off-duty meal period is no right at all. Hence, Guardsmark reasons that an agreement to
 19 an on-duty meal period waives nothing and, therefore, the prohibition against meal period waivers
 20 contained in section 512 does not apply. This restrictive interpretation is contrary to that which
 21 the court is required to perform to insure the remedial purpose of the meal period statute, i.e., to
 22 protect the right to work-free meal periods.

23 **B. Plaintiff Agrees With Guardsmark’s Definition of Waiver**

24 Citing the renowned treatise, Black’s Law Dictionary, Guardsmark asserts that the word
 25 “waive” means “[t]o abandon, renounce, or surrender (a claim, privilege, or right); to give up (a
 26 right or claim) voluntarily.” (8th ed. 2004). Plaintiff agrees with this definition. Plaintiff
 27 disagrees, however, with Guardsmark’s illogical leap that an on-duty meal period waives nothing.
 28 This is simply not true. Clearly, by agreeing to an “on-duty” meal period an employee “abandons,

1 renounces and surrenders,” i.e., “gives up,” his or her right to an off-duty meal period. There is
2 simply no way that Guardsmark can argue to the contrary.

3 The central flaw in Guardsmark’s reasoning lies in its assertion that off-duty *and* on-duty
4 meal periods exist at the same time. They do not. They are mutually exclusive, one existing as a
5 matter of law and statutory right, the other existing only when an employee relinquishes a
6 statutory right. An employee is entitled to an off-duty meal period as a matter of law the moment
7 employment begins. Cal. Code Regs. tit. 8 § 11040 Absent an agreement to the contrary, this
8 right is absolute. An on-duty meal period exists *only* if and when an employee agrees to abandon
9 and surrender his pre-existing right to an off-duty meal period break and accept in its place an on-
10 duty meal break. This agreement is not only clearly a waiver of the right to an off-duty meal
11 period, it can *only* be so.

12 **C. DLSE Pronouncements Support Plaintiff’s Position**

13 Again, Plaintiff agrees with Guardsmark’s citations to the level of deference a court may
14 give DLSE manuals and memos. Guardsmark, however, cannot selectively choose what
15 pronouncements it wishes the Court to adopt and those it wishes the Court to ignore: “In for a
16 penny, in for a pound as they say.” The California Supreme Court in Gattuso v. Harte-Hanks
17 Shoppers, Inc., 42 Cal. 4th 554, 563 (2007), instructed us all that a court may adopt a DLSE
18 interpretation if the court determines that the interpretation is correct.

19 Wanting to have its cake and eat it too, Guardsmark desires this Court to somehow adopt
20 an alleged interpretation that the DLSE issued in 1999, that did not in any manner address the
21 question before this Court, but ignore a DLSE interpretation in 2002 that directly addresses the
22 question. In 1999, the question that the DLSE answered was whether the passage of AB 60
23 “prohibits on-duty meal periods” in any circumstance. The DLSE answered that question in the
24 negative. One cannot find a single passage in the twenty (20) page memorandum to which
25 Guardsmark refers that even hints at the question before this Court, i.e., can an employee waive
26 his or her right to an off-duty meal period more than one time in a single day.

27 When the DLSE addressed the specific question before this Court in 2002, it answered the
28 question in the negative. Recognizing that agreeing to an on-duty meal period is a waiver of an

1 employee's right to an off-duty meal period, the DLSE confirmed section 512's prohibition
2 against such a circumstance occurring more than once in the same day stating:

3 When an employee works more than six (6) hours, there is only one set of circumstances
4 wherein a first meal period may be waived and that is if the employee accepts, in writing,
5 an on-duty meal period under the conditions set out in the Orders concerning the nature of
6 the work, precluding an employee from being relieved of all duty. This provision of the
7 IWC Orders and Labor Code § 512(a) precludes two on-duty periods in any one day.

8 This DLSE interpretation is the only reasonable interpretation of the dictates of section 512
9 and the allowance for "an" on-duty meal period in the Wage Orders. Section 512 clearly
10 contemplates a meal period to be one where the employee is relieved of all duty, as this is the
11 employee's statutory right. Any waiver of the statutory right to an off-duty meal period may occur
12 only once in a given day. In like vein, sections 11 (A) and (B) of the Wage Order similarly
13 contemplate a meal period to be one in which an employee is relieved of all duty. When an
14 employee "agrees" to an on-duty meal period, this is clearly a waiver of the right to an "off-duty"
15 meal period. In section 11(C), where the IWC discusses the allowance for "an" on-duty meal
16 period, it does so only in the singular. This singular reference is perfectly consistent with the
17 prohibition in section 512 against an employee waiving his or her right to an off-duty meal period
18 more than once in a given day.

19 Again, Guardsmark cannot point to a single statute that specifically states "an employee
20 may agree to two on-duty meal periods in a given day." If such a provision existed, there would
21 be no need for proposed bill AB 1711. See Kramer v. Intuit Inc., 121 Cal. App. 4th 575, 579
22 (2004)(subsequent enactment helpful in discerning legislative intent). Guardsmark, not Plaintiff, is
23 the one engaging in tortured statutory construction to accomplish its goal of allowing
24 "agreements" whereby employees work over ten (10) hours a day and are never relieved of all
25 duty and are not compensated for this fact as required by section 226.7. Labor Code section 219
26 simply prohibits any such "agreements."

II. CONCLUSION

The California Supreme Court instructs us that the regulation of wages, hours and working conditions at issue before this Court are “for the protection and benefit of employees,” not for the economic convenience of the employer. As such, courts must interpret the statutory provisions liberally, “with an eye to promoting such protection.” In its moving papers, Guardsmark ignores the purpose behind section 512 and the Wage Order protections regarding meal periods. Indeed, Guardsmark does not cite to the purpose of these statutes at all. This failure can only be because Guardsmark’s restrictive interpretation it seeks this Court to adopt is at odds with this purpose. Requiring employees to work more than ten (10) hours in a single day without ever being relieved of duty does not protect the employees. This interpretation does nothing to foster the goal and purpose of the IWC to assure workers get work-free meal periods. Rather, the interpretation proffered benefits only the employer, as it frees the employer from compensating the employee if the employer fails to relieve the employee of all duty for at least one of the meal periods in a given day.

As such, Plaintiff respectfully requests that this Court deny Guardsmark’s motion for partial summary judgment.

Date: January 18, 2008

QUALLS & WORKMAN, L.L.P.

By: /S/ Robin G. Workman
Robin G. Workman
Attorneys for Plaintiff Johnny McFarland,
and all others similarly situated.

PROOF OF SERVICE

I, the undersigned, hereby declare:

I am a member of the bar of this court. I am over the age of eighteen years and not a party to the within action. My business address is Qualls & Workman, L.L.P., 244 California Street, Suite 410, San Francisco, California.

October 25, 2007, I served a true and correct copy of the **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT** electronically. I caused said documents to be transmitted using ECF as specified by General Order No. 45 to the following parties:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 18, 2008, at San Francisco, California.

/S/ Robin G. Workman